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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For The Tenth Circuit

BRIEF OF THE PETITIONERS

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HOPP

QUESTION PRESENTED

Oklahoma's Preparole Program vests the Corrections Department with the discretion to permit inmates to serve their sentences outside of correctional facilities. Under the Program, inmates: (1) remain in the custody of the Corrections Department; (2) are subject to prosecution for escape; and (3) are subject to Department disciplinary proceedings. In light of the nature of Oklahoma's Preparole Program, the question presented is:

> Whether inmates, once placed on Oklahoma's Preparole Conditional Supervision Program, have a liberty interest protected by the Due Process Clause of the Fourteenth Amendment in continued participation in the Program?

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On Writ of Certiorari to
The United States Court of Appeals
For The Tenth Circuit

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 64 F.3d 563 and is reprinted in the Appendix to the Petition for Writ of Certiorari at pages 1a to 15a.[1] The Order of February 13, 1996, denying the Petition for

[1]References to the Appendix to the Petition for Writ of Certiorari will hereinafter being with "Pet. App." and will be further identified by the page number assigned thereto. In (continued...)

Rehearing and Suggestion for Rehearing En Banc is unreported. Pet. App. at 16a to 17a. The Order of February 28, 1996, reflecting that five judges would have granted rehearing is unreported. Pet. App. at 18a to 19a.

The District Court's Order entered January 10, 1995 is unreported. Pet. App. at 20a to 37a. Additionally, the Opinion of the Oklahoma Court of Appeals is reported at 852 P.2d 164. Pet. App. at 38a to 42a.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on August 30, 1995. Pet. App. at 1a to 15a. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 13, 1996. Pet. App. at 16a to 17a. The Petition for Writ of Certiorari was filed in this Court on April 4, 1996, and was granted on May 28, 1996. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. § 1254(1).

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[1](...continued)
addition, reference to the Joint Appendix will hereinafter begin with "Jt. App." and will be further identified by the page number assigned thereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES:

Okla. Stat. tit. 57, § 365 (Supp. 1990):

> **Preparole Conditional Supervision Program**
>
> A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the

custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of Title 57 of the Oklahoma Statutes, shall be eligible to participate in this program; and

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within one (1) year of his projected release date, prior to being eligible for this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town. The Department also shall provide written notification of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town to any victim of the crime for which the inmate was convicted by mailing the notification to the last-known address of the victim, if such information is requested by the victim. The Department of Corrections shall not give the address of the inmate to any victim of the crime for which the inmate was convicted.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

STATEMENT OF THE CASE

This matter addresses the issue of whether the Pre-Parole Conditional Supervision Program[2] (the "Program") which is supervised and regulated by the Oklahoma Department of Corrections ("DOC"), but allows an inmate to enter and live in the community, is tantamount to parole. A determination of the issue is required to resolve the issue of whether an inmate placed in the Program has a liberty interest in continued participation in such Program.

The Respondent is an inmate in custody of the Oklahoma Department of Corrections. On October 16, 1990, the Respondent was placed on the Program. The Respondent was to abide by certain rules and conditions. The Respondent was advised of such rules and conditions and also advised concerning the options available in the event of parole denial. The Respondent was aware that this was merely a transfer to a lower security status and that he remained within the custody and confines of the DOC.[3] Jt. App. at 4-6.

On March 14, 1991, the Respondent's classification as a program participant was terminated because the Governor of the State of Oklahoma had denied the Respondent parole. The Respondent was notified of the parole denial and then, without a hearing, transferred to a more secure facility. Jt. App. at 10-12.

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[2]See Okla. Stat. tit. 57, § 365 (Supp. 1990).

[3]The Respondent signed an orientation form and a copy of the rules and conditions of the Program which reveals he was aware of the options if parole was denied and aware that he was merely being placed on a lower security status within the DOC. See Jt. App. at 4-6, para. 14.

A. Proceedings in the Highest State Court.

In 1992, the Respondent filed a petition for writ of habeas corpus with the Oklahoma Court of Criminal Appeals alleging that he was improperly removed from the Program without the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471 (1972). At the same time that the Court of Criminal Appeals was considering the Respondent's petition, another inmate, Matthew W. Barnett, had a similar action pending before the Court. See Barnett v. Moon, 852 P.2d 161 (Okla. Crim. App. 1993).

The primary difference between the two actions, however, was that Mr. Barnett had been removed from the Program for disciplinary reasons.[4] The Respondent, however, was removed from the Program because he had been denied parole by the Governor of the State of Oklahoma. See Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Jt. App. at 10-12.

The Court of Criminal Appeals held that the Respondent was aware, when placed on the Program, that if denied parole he may be removed from the Program. Thus, the Respondent had suffered no due process violation.[5] Pet. App. at 38a to 42a.

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[4]Mr. Barnett was arrested for public drunk. Barnett, 852 P.2d at 163.

[5]In Barnett, the Court held that due to the disciplinary reason for the removal, Mr. Barnett was entitled to due process set forth in Wolff v. McDonnell, 418 U.S. 539 (1974). Mr. Barnett was not only returned to an institutional facility but also lost good time credits.

B. Proceedings in the District Court.

On October 13, 1993, the Respondent filed a Petition for Writ of Habeas Corpus with the United States District Court for the Northern District of Oklahoma ("District Court"). Again, Respondent alleged that he was denied due process when removed from the Program. The District Court, after discussing whether the Respondent had a liberty interest in remaining on the Program under the Fourteenth Amendment or created by state law, denied the Respondent any relief. Pet. App. at 20a to 37a.

The District Court discussed the many differences between parole and the Program. The District Court concluded that because the Respondent had not been released from institutional life altogether, he did not have a liberty interest in remaining on the Program protected by the Fourteenth Amendment. Pet. App. at 34a to 35a. The District Court held:

> Although Petitioner [Respondent herein] was permitted to live outside an institution, work and interact with family and friends, his release from institutional life was conditioned on obtaining parole. Moreover, Petitioner's [Respondent's] return to the general prison population did not subject him to confinement beyond the sentence initially imposed upon him. See Vitek, 445 U.S. at 480.

Pet. App. at 34a to 35a. The District Court also found that the state had not created a liberty interest in remaining on the Program. Pet. App. at 35a to 37a.

C. Proceedings in the Court of Appeals.

The Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. A three-judge panel of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") reversed the decision of the District Court. Pet. App. at 1a to 15a.

The Court of Appeals held that placement on the Program furnishes an inmate a liberty interest in continued participation protected by the Fourteenth Amendment. The Court of Appeals held, in accordance with the Eighth Circuit Court of Appeals in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), that when a program releases an inmate into society on a full-time basis, the program more closely resembles parole or probation than any other form of institutional confinement. Pet. App. at 12a. Thus, the Court of Appeals held that the Respondent was entitled to the procedural safeguards provided in Morrissey v. Brewer. Pet. App. at 12a.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On February 13, 1996, the Court of Appeals issued its Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 16a to 17a. On February 28, 1996, the Court of Appeals issued an amendment to its Order denying rehearing, reflecting that five judges would have granted rehearing. Pet. App. at 18a to 19a.

The Petitioner filed a motion to recall mandate and application for stay. On March 6, 1996, the Court of Appeals issued an Order recalling the mandate and stayed the issuance of the mandate pending the Petitioner's filing for writ of certiorari with this Court. Jt. App. at 16.

SUMMARY OF ARGUMENT

In 1988, the Oklahoma State Legislature enacted a program to assist in alleviating the prison overcrowding crisis with the State. The Program provides that the Program shall be utilized whenever the prison population exceeds ninety-five percent (95%) of its capacity. The Program will then continue until the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity. Okla. Stat. tit. 57, § 365 (Supp. 1990).

Okla. Stat. tit. 57, § 365 (Supp. 1990), sets forth the guidelines which inmates must meet before they are eligible for consideration. In addition, Section 365 provides that an inmate who participates in the Program shall be subject to disciplinary procedures of the DOC. Additionally, the statute provides that if an inmate escapes from the Program, the inmate shall be subject to prosecution for the crime of escape pursuant to Section 443 of Title 21 of the Oklahoma Statutes.

The Respondent was placed on the Program on October 16, 1990. Jt. App. at 4. On March 14, 1991, after being denied parole by the Governor of the State of Oklahoma, the Respondent was reclassified to a higher security status and not permitted to participate in the Program. Jt. App. at 10-12. The Respondent did not receive any type of hearing before being transferred to a higher security facility.

The Court of Appeals determined that the Respondent had a liberty interest in continued participation in the Program because the Program is more similar to parole than to minimum security imprisonment. Thus, the Court of Appeals concluded that the Respondent was entitled to a hearing pursuant to Morrissey v. Brewer, 408 U.S. 471 (1972) before he was removed from the Program and given a higher security classification. Pet. App. at 1a to 15a.

The judgment of the Court of Appeals must be reversed for the reasons that the Court of Appeals (1) misanalyzed the actual confines in which an inmate placed on the Program must abide; and (2) ignored the fact that the determination of whether to place an inmate in a more secure facility, particularly in this matter where the Respondent was denied parole, is not a factual determination but is purely predictive and discretionary.

First, the Court of Appeals was in error when it held that a liberty interest was created merely because an inmate on the Program is not confined behind four institutional walls. In Morrissey v. Brewer, 408 U.S. at 482, this Court held that the determinative factor of whether a liberty interest exists is the nature of the interest involved, rather than its weight. See also Meachum v. Fano, 427 U.S. 215, 224 (1976). The nature of the interest involved in this matter is a degree of confinement from which an inmate may be transferred if he is denied parole, violates any rule or condition of the Program or for any other reason at the discretion of the DOC.

In Meachum v. Fano, this Court specifically held that an inmate holds no liberty interest in his or her place or degree of confinement. Meachum v. Fano, 427 U.S. at 224. Likewise, whatever deprivation an inmate on the Program experiences by virtue of the change in the degree of confinement and resultant classification to a more supervised prison environment does not encroach on any liberty interest protected by the Due Process Clause itself.

An inmate on the Program is treated just as an inmate behind four institutional walls. The inmate remains in the custody of the DOC, is subject to DOC disciplinary proceedings and will be considered an escapee if he fails to report as required. Okla. Stat. tit. 57, § 365 (Supp. 1990). For these reasons, an inmate on the Program is not similar to a parolee but is most similar to an

inmate residing in a minimum security prison. Thus, an inmate on the Program does not have a liberty interest in continued participation in the Program protected by the Due Process Clause itself.

In addition, the State of Oklahoma has not created a liberty interest in continued placement on the Program. Transfer from the Program to a higher security status does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life". Sandin v. Conner, 515 U.S ___, 132 L.Ed.2d 418, 430 (1995). The inmate's term of confinement is not lengthened by such transfer as is routine with parole or with the revocation of earned credits.

Furthermore, the alleged deprivation is consistent with the inmate's sentence. The inmate is aware that if parole is denied he may be transferred from the Program. Thus, any alleged deprivation is foreseeable and not unexpected. Accordingly, the Respondent, nor any inmate placed on the Program, does not have a liberty interest in remaining on the Program.

Second, a hearing pursuant to Morrissey v. Brewer is not required because, in the event of parole denial, there are no factual determinations to be made as with parole revocation. Just as in Meachum v. Fano the determination of whether to transfer an inmate is purely predictive and discretionary. Thus, a Morrissey hearing is not necessary to assure that the facts are verified or that the decision maker has an "accurate knowledge of the [inmate's] behavior". Morrissey v. Brewer, 408 U.S. at 484.

Likewise, a disciplinary hearing pursuant to DOC guidelines and Wolff v. McDonnell, 418 U.S. 539 (1974), as mandated by Okla. Stat. tit. 57, § 365 (Supp. 1990), is sufficient to ensure that an inmate is not arbitrarily disciplined due to a rule

violation. The determination of the Court of Appeals that a Morrissey hearing is required must be reversed.

ARGUMENT

PROPOSITION

PLACEMENT ON THE PROGRAM DOES NOT FURNISH AN INMATE A LIBERTY INTEREST IN CONTINUED PARTICIPATION IN SUCH PROGRAM PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has held that liberty interests protected by the Due Process Clause of the Fourteenth Amendment may arise from two sources -- "the Due Process Clause itself and the laws of the States". Hewitt v. Helms, 459 U.S. 460, 466 (1983). The Court of Appeals found that the Respondent had a liberty interest in remaining on the Program which arose from the Due Process Clause itself. Although the Court of Appeals did not discuss whether such an interest also arose from the laws of the State of Oklahoma, the Petitioner will address both ways in which a liberty interest may be created. The Respondent did not obtain a liberty interest in continued participation in the Program from either source.

A. DUE PROCESS CLAUSE.

1. Nature of the Interest. In Meachum v. Fano, 427 U.S. 215, 224 (1976), this Court stated that upon receiving a valid conviction, an inmate is constitutionally deprived of his liberty to the extent that the State

may confine him and subject him to rules of its prisons, so long as the conditions of confinement do not violate the Constitution. In Meachum v. Fano, this court found that the transfer of an inmate from one institution to another was not protected by the Due Process Clause itself. Likewise, in the instant matter, the transfer of the Respondent from the Program to a more secure facility is not protected by the Due Process Clause.

In 1994, state prisons housed 841,113 prisoners while federal prisons held 94,827 prisoners. All state and federal correctional facilities, however, were designed to hold only 769,928 prisoners.[6] Clearly, our prison system is in a state of crisis.

The Pre-Parole Conditional Supervision Program was enacted by the Legislature of the State of Oklahoma as a program to assist in alleviating the problem of overcrowding within the prison system of the State. See Okla. Stat. tit. 57, § 365 (Supp. 1990). Many states have enacted similar programs as a solution to this widespread, nationwide crisis of prison overcrowding.[7]

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[6]Bureau of Justice Statistics, U.S. Department of Justice, 1994 Sourcebook of Criminal Justice Statistics 537 (Kathleen Maguire and Ann L. Pastore eds., 1995). Petitioner notes that the states of Arizona, Georgia, Maine and Nevada are not reflected in these statistics.

[7] Alabama: Ala. Code § 14-8-110, et seq. (1995).
Arizona: Ariz. Rev. Stat. Ann. § 41-1604.13 (Supp.1995).
Delaware: Del. Code Ann. tit. 11, § 6539 (1995).
Illinois: Ill. Ann. Stat. ch. 730, para. 1005-8A-3 (1995).
Maryland: Md. Code Ann., Crim. Law § 689A (1992).
Michigan: Mich. Comp. Laws § 791.265(h) (Supp.1996).
Mississippi: Miss. Code Ann. § 47-5-1003 (Supp.1996).
(continued...)

These programs are essential to solve the dilemma of overcrowding.

The Program, which is supervised by the DOC, allows an inmate to reside outside a correctional facility. The inmate, however, remains within the custody of the DOC and is treated just as any other inmate remaining behind four institutional walls. An inmate on the Program has not "been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person". Morrissey v. Brewer, 408 U.S. at 482.[8] The inmate is placed on the Program due to overcrowding in the prison system. Okla. Stat. tit. 57, § 365 (Supp. 1990).[9]

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[7](...continued)
Missouri: Mo. Ann. Stat. § 217.541 (1995).
Nevada: Nev. Rev. Stat. § 209.392 (1995).
Vermont: Vt. Stat. Ann. tit. 28, § 808 (1995).
Wisconsin: Wis. Stat. Ann. § 301.048 (1995).

[8]In fact, in the present matter, the Respondent was removed from the Program because he did not meet such criteria.

[9]The Program can be analogized to a furlough program wherein an inmate is permitted to leave a facility for a limited period of time. Likewise, on the Program an inmate is transferred for a limited time for the purpose of overcrowding. Once the purpose of the Program is eliminated, the inmate may be transferred to a facility as his placement in the Program will no longer serve the purpose for which it is intended. Courts have consistently held that inmates have no liberty interest in continued participation in furlough programs. See Bowser v. Vose, 968 F.2d 105 (1st Cir. 1992); Smith v. Saxbe, 562 F.2d 729 (D.C.Cir.1977).

The Court of Appeals held that the Respondent had a liberty interest in continued participation in the Program which arose from the Due Process Clause itself. The basis of this finding was the determination by the Court of Appeals that the Program was more similar to parole than to a minimum security facility. This finding was erroneous.

In discussing the meaning of "liberty" as set forth in the Due Process Clause, this Court in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972) stated:

> "While this Court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men."

Id. (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The interest of an inmate on a Program which allows for an inmate's transfer upon denial of parole is not a liberty interest protected by the Due Process Clause itself.

The Program is not the equivalent of parole. Although an inmate on the Program, like a parolee, is allowed to reside in his

own home and work outside the correctional facility, an inmate on the Program does not possess the same "liberty" as a parolee.[10]

An inmate on the Program remains within the custody and control of the DOC. An inmate on the Program is subject to disciplinary proceedings pursuant to DOC guidelines for any violation of a rule. Finally, such an inmate is considered an escapee if he fails to report as required. See Okla. Stat. tit. 57, § 365 (Supp. 1990). The only difference between an inmate behind four walls and an inmate on the Program is the security level classification.

In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court held that when an inmate is placed on parole he or she obtains a liberty interest which is valuable and must be protected by the Fourteenth Amendment. This Court recognized that while a parolee is subjected to many restrictions, his condition is very different from that of confinement in a prison. Together with the ability to reside at home, this Court recognized that a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. Accordingly, this Court held:

> ...the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others.

Morrissey v. Brewer, 408 U.S. at 482.

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[10]The many differences between parole and the Program include, but are not limited to: (1) a parolee can leave the state while an inmate on the Program cannot; and (2) a parolee may be unsupervised after three years on parole while an inmate on the Program must remain supervised at all times. See Okla. Stat. tit. 57, § 347 (1991); Okla. Stat. tit. 57, § 512 (Supp.1993).

In Meachum v. Fano, 427 U.S. at 224, this Court rejected the notion that any "grievous loss" invokes the protection of the Due Process Clause. This Court explicitly held that the determining factor is the nature of the interest involved rather than its weight. Id. See also Sandin v. Conner, 132 L.Ed.2d at 428.

The interest involved in the present matter is a degree of confinement, albeit constructive, in which an inmate may be placed if he or she meets certain requirements. Okla. Stat. tit. 57, § 365 (Supp. 1990). Likewise, an inmate may be transferred to a higher degree of confinement at the discretion of the DOC for any reason. As stated above, this Court has held that an inmate holds no liberty interest under the Due Process Clause in his or her placement or degree of confinement. Meachum v. Fano, 427 U.S. at 224. Likewise, whatever deprivation an inmate on the Program experiences by virtue of a change in the degree of confinement and resultant classification to a more supervised prison environment does not encroach on any liberty interest.

The nature of the interest is very different from that of a parolee. In Morrissey v. Brewer, this Court held that an inmate is released to parole after an evaluation that he can return to society and function as a responsible person. In addition, this Court found that a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. Morrissey v. Brewer, 408 U.S. at 482. An inmate on the Program is not placed on the Program after a finding that he will function well in society. Instead, the inmate is placed on the Program, at the discretion on the DOC and pursuant to the need of the State to manage its prison population. Furthermore, an inmate on the Program is not given a promise that he will be transferred only if he violates a condition of the Program. Instead, an inmate on the Program is aware that he may be reclassified to a higher security level for any reason, including (1)

the Governor has denied the inmate parole; (2) the inmate no longer meets the eligibility requirements of continued placement;[11] or (3) the inmate violates a rule or condition of the Program. Jt. App. at 4, 5 and 9.

An inmate on the Program has only a unilateral expectation or hope that he will remain on the Program. As this Court stated in Meachum v. Fano, 427 U.S. at 428:

> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.

An inmate on the Program is clearly aware that he is within the custody and confines of the DOC.[12] Although there are no fences or bars, inmates on the Program do not enjoy **total release** from institutional life as they remain within the disciplinary and procedural confines of the DOC.

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[11]This may be through failure to obtain employment, denial of parole or any other reason at the discretion of the DOC. See Jt. App. at 7-9.

[12]The inmate continues to receive earned credits while on the Program. In addition, the inmate is aware that if he violates any rule or condition of the Program, he will be subject to the disciplinary proceedings of the DOC. Furthermore, the inmate is aware that if he should fail to report as required, he will be considered an escapee and will be subject to prosecution pursuant to Okla. Stat. tit. 21, § 443 (1991). See Okla. Stat. tit. 57, § 365 (Supp. 1990).

While an inmate on the Program may enjoy some of the same freedoms as a parolee, he does not enjoy the freedom of knowing he will remain on the Program unless he violates a rule or condition of the Program. An inmate on the Program is aware that he may be transferred to a higher security level if the Governor, through his discretionary power, denies parole.[13] In addition, an inmate on the Program knows that he can be transferred to a higher security level if the DOC determines, through their discretionary power, that he can no longer participate in the Program for any reason or for no reason. Jt. App. at 4-6.[14] Just as in Meachum v. Fano, 427 U.S. at 228, the DOC has the discretion to transfer an inmate on the Program for any number of reasons, not just for misconduct. Accordingly, the nature of the interest of an inmate on the Program is more similar to an inmate in a minimum security prison rather than an inmate on parole.

In United States v. Taylor, 47 F.3d 508 (2d Cir. 1995), the United States Court of Appeals, Second Circuit held that the Connecticut Supervised Home Release program is a type of confinement. The Connecticut program is strikingly similar to the subject Program. Like the Program, inmates on the Connecticut

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[13]At the time the Respondent was placed on the Program, he was advised of the options available should parole be denied. Shortly after the Respondent was transferred to a higher security status, policy was written that in the event parole was denied by the Governor, the inmate would remain on the Program and within ninety (90) days a review would be held to determine whether the Parole Board desired to allow the inmate to continue participation in the Program. Pet. App. at 53a to 59a. Whether to transfer an inmate from the Program remains within the discretion of the Department of Corrections.

[14]Again, such determination may be based on program failure through inability to find employment or remain in an educational program.

program are allowed to live in their own homes. Such inmates are subject only to standard conditions. In addition, just like the subject Program, an inmate on the Connecticut program who fails to report as required can be found guilty of the crime of Escape.

The Connecticut Supreme Court concluded that an inmate on the program more closely resembled a person confined in a minimum security prison. The Court relied on two factors in making this determination:

> (1) authority over the prisoner remains vested in the Department of Correction, rather than the Board of Parole, just as with any other prisoner serving a prison sentence; and (2) absconding from SHR [Supervised Home Release] constitutes a new crime of escape, whereas a parolee only faces revocation of parole.

Taylor, 47 F.3d at 510. The United States Court of Appeals, Second Circuit agreed with the conclusion of the state court and concluded that the program was a type of confinement. Likewise, the subject Program is merely a degree of confinement. Thus, pursuant to Meachum v. Fano, an inmate in the Program has no liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[15]

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[15]The Court of Appeals adopted the reasoning in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), to support their finding. In Edwards, the evidence revealed that the work/study release program and parole were generally the same. Based upon this evidence and the fact that Edwards had been released from institutional life altogether, the Court found Edwards had a liberty interest in remaining in such program. As shown above, the Program is distinctly different from the program in Edwards. An

(continued...)

The Court of Appeals appeared to base its decision solely on the fact that an inmate on the Program was not "confined" behind four institutional walls. Following the position of the Court of Appeals, an inmate placed on an electronic home monitoring program ("EHM") would have the same liberty interest as a parolee. Such a finding would be absurd. Although, an inmate on EHM lives outside four institutional walls, his liberty is severly restricted by the Program. The Court of Appeals, however, draws no distinction between an inmate with few restrictions, such as a parolee and an inmate with considerable restrictions, such as an inmate on the Program or EHM. As stated in Morrissey v. Brewer and Meachum v. Fano, this Court must look at the nature of the interest. In reviewing the nature of the interest, it is apparent that the Respondent does not have a liberty interest in remaining at this degree or classification of confinement.

2. A Morrissey hearing is inappropriate. The Court of Appeals concluded that a hearing pursuant to Morrissey v. Brewer must be provided prior to an inmate being transferred to a higher security facility. A Morrissey hearing would not be appropriate when an inmate is removed due to denial of parole as there is no "claimed violation".

In Morrissey v. Brewer, this Court discussed the two steps in a revocation decision. The first step was to determine whether the parolee had in fact violated a condition of parole. Thus, the first step involved a "wholly retrospective factual question". Morrissey v. Brewer, 408 U.S. at 479. Only if a determination

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[15](...continued)
inmate on the Program remains in the custody of the DOC and is not totally released from institutional life. An inmate on the Program does not enjoy all of the freedoms of a parolee.

was made that the parolee had in fact violated a condition of confinement did the second step come into play.

The second step involved a determination of whether the parolee should be recommitted to prison. This second step is not purely factual, but is also predictive and discretionary. Id, 408 U.S. at 480.

This Court discussed the necessity of the procedures set forth in Morrissey v. Brewer to "assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior". Id, 408 U.S. at 484. Thus, the true significance of a Morrissey hearing is to make the factual findings required to progress to step two -- has the parolee violated his conditions of parole.

When an inmate of the Program is denied parole, there is no factual question. Such "verified facts" and "accurate knowledge of the parolee's behavior" are not necessary in making the decision of whether to transfer an inmate to a higher level of security. The only question is whether the inmate should be transferred. Such a determination is purely predictive and discretionary. Such a decision would not be assisted by any type of adversary proceeding. As this Court stated in Meachum v. Fano, 427 U.S. at 225:

> Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.

The transfer of an inmate from the Program to a more secure facility, when based upon the denial of parole, is purely discretionary; thus, a Morrissey hearing is not appropriate.[16]

Likewise, when an inmate on the Program violates a rule or condition of the Program, a Morrissey hearing is not required. Instead, the inmate is subjected to a disciplinary hearing pursuant to Wolff v. McDonnell, 418 U.S. 539 (1974).[17] Thus, an inmate who is accused of violating a rule or condition of the Program is given an appropriate hearing to ensure that a determination of the proper disciplinary action will be based upon true and correct factual findings.[18] Just like an inmate confined in an institution, the protections afforded an inmate on the Program for violation of a rule or condition of the Program, pursuant to the DOC disciplinary procedures are sufficient to protect any interest of an inmate placed on the Program.

An inmate on the program is treated just as if he were confined within the four walls of a facility. The inmate is subject to disciplinary proceedings of the DOC if a violation occurs and he will be considered an escapee if he fails to report as required. Okla. Stat. tit. 57, § 365 (Supp. 1990). The inmate is aware that

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[16]Just as in Meachum v. Fano, the DOC has the discretion to transfer prisoners for any number of reasons. Okla. Stat. tit. 57, § 510 (1991).

[17]Such a hearing is mandated pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990).

[18]When an inmate is transferred from the Program to a facility this is a result of a classification review, rather than a form of discipline. Just as the prison officials in Massachusetts as discussed in Meachum, Oklahoma prison officials can transfer an inmate for any reason. See Okla. Stat. tit. 57, § 510(9) (1991).

he remains in the custody and control of the DOC and can be reclassified to a higher level of security if deemed necessary by the DOC. Jt. App. at 10-12. Accordingly, the nature of the interest is the same as an inmate confined within a facility rather than a parolee. The inmate does not have a liberty interest in continued placement in the Program protected by the Due Process Clause of the Fourteenth Amendment.

This Court has continually held:

> "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460-461 (1989) (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)). See also Hewitt v. Helms, 459 U.S. at 468; Vitek v. Jones, 445 U.S. 480, 493 (1980). The transfer of an inmate from the Program to a higher security level upon denial of parole or even upon violation of a rule is within the terms of confinement contemplated by a prison sentence. Hewitt v. Helms, 459 U.S. at 468. Thus, such transfer is not protected by the Due Process Clause itself.

B. STATE-CREATED LIBERTY INTEREST

Liberty interests can be created by a state through statutes, regulations or in the practices of state or county officials,[19] which specifically guarantee certain rights not protected by the Due Process Clause of the Fourteenth Amendment itself. Once a state has provided certain rights, the Due Process Clause must insure that those state-created rights are not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. at 557. States have a choice in whether to create rights not already guaranteed by the Constitution and it is only when they choose to do so that the Due Process Clause will insure protection of such rights.

This Court dealt with state-created liberty interests in Wolff v. McDonnell where it held that state statutes can create liberty interests that do not normally exist for a prisoner under the Fourteenth Amendment's Due Process Clause. Id. In Wolff v. McDonnell, the Nebraska prison officials took away prisoners' good time credits before holding a hearing to determine whether the prisoners' actions constituted flagrant or serious misconduct. Id. Based on Neb. Rev. Stat. § 83-185 (Cum.Supp.1972) and testimony from the prison warden concerning the prison procedures which were in effect at the time these good time credits were taken away, this Court found it clear that Nebraska law provided that deprivation of good time credits could occur only after a hearing with the Adjustment Committee where the misconduct was found to be serious or flagrant. Id. at 548-553. Because the applicable state law in their case stipulated that good time credits could only be taken away for one specific reason (flagrant or serious misconduct), and only after an appropriate hearing, the state had created a protected liberty interest in not taking away good time credits for other reasons or without the

[19]See Vitek v. Jones, 445 U.S. at 489-490.

appropriate hearing. This Court also examined the nature of the liberty interest and found that the state had created a right to a shortened prison sentence, thus, the prisoner's interest had "real substance," entitling protection under the Fourteenth Amendment's Due Process Clause. Id. at 557.

This Court more thoroughly addressed the issue of state-created liberty interests in Meachum v. Fano, 427 U.S. 215 (1976). There, prisoners were claiming they had a protected liberty interest in not being transferred from a medium security facility to a maximum security facility. The prisoners alleged this liberty interest had been violated when they were transferred without a hearing. Unlike Wolff v. McDonnell, however, there was no state law or statute stipulating that transfers could only take place for certain reasons. Since there was no state statute which stripped the discretionary powers of prison officials in this area this Court held that no liberty interests had been created by the state . Meachum v. Fano, 427 U.S. at 228-229. This Court held that prison officials have broad discretion when overseeing the administration of their prisons, unless the state had specifically taken away their discretion in a particular area. Id. This Court stated:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges.

Id.

Finally, in the recent case of Sandin v. Conner, 515 U.S. __, 132 L.Ed.2d 418 (1995), this Court stated it was time to return to the due process principles which were correctly

established in Wolff v. McDonnell and Meachum v. Fano with regard to state created liberty interests. Sandin v. Conner, 132 L.Ed.2d at 428. This Court recognized that states may create liberty interests under certain circumstances. Id. 132 L.Ed.2d at 429. This Court explained:

> [T]hese interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, (Citations omitted), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. 132 L.Ed.2d at 430.

In the present case, as previously stated, an inmate in the Program knows that he has simply been transferred to a lower security level within the confinement and custody of the DOC. Jt. App. at 4-6. Additionally, he is aware that should he remove himself from consideration of parole, he will be transferred to a higher security level. Jt. App. at 9. An inmate on the Program is also aware that if he is not employed within thirty days of placement on such Program, he will be transferred to a higher security level. Jt. App. at 6. Most significantly, an inmate in the Program is treated as any other inmate in the confinement and custody of the DOC. He is still able to earn credits which help reduce his term of incarceration, he is subject to disciplinary proceedings, and he will be considered an escapee for failure to report as required. Okla. Stat. tit. 57, § 365 (Supp. 1990). A transfer to a higher security level is an action within the contemplation of the ordinary incidents of prison life for an inmate on the Program. The transfer does not affect the duration of an inmate's sentence in any way. Thus, transferring an inmate to a

higher security level within the custody of the DOC when their parole has been revoked by the Governor cannot be considered an atypical and significant hardship within the ordinary incidents of prison life.

This Court in Wolff v. McDonnell found that the state had created a liberty interest in not taking away good time credits without a proper hearing. Wolff v. McDonnell, 418 U.S. at 548. The nature of this state-created interest was found to be substantial since good time credits resulted in a reduced prison sentence. Id. 418 U.S. at 557. Because the nature of the state created interest was so substantial, this Court held that the Due Process Clause must insure that, "the state-created right is not arbitrarily abrogated." Id. More recently, this Court in Sandin v. Conner, when examining the nature of the state-created liberty interest, looked to whether the state-created right presented an atypical and significant hardship on the prisoner within the ordinary incidents of prison in determining whether the nature was substantial. Sandin v. Conner, 132 L.Ed.2d at 430. Since solitary confinement was within the ordinary confines of the inmate's sentence, and since the solitary confinement did not affect the duration of the inmate's sentence, this Court held that solitary confinement did not present the inmate with an atypical and significant hardship. Id. This Court has also noted that inmates may have unilateral hopes with regard to their prison sentences, such as the hope that their sentence will be commuted, or the hope that they will not be transferred. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981). This Court held, however, that these unilateral hopes cannot be considered substantial in nature. Id. See also Sandin v. Conner, 132 L.Ed.2d at 431 n. 9.

Clearly, in the present case, an interest in not being transferred to a higher level of security is not so substantial in nature as to require protection under the Due Process Clause.

Although transferring an inmate to a higher security status may be a deprivation, confinement within four walls of an institution is an ordinary incident of prison life.[20] Just as in Sandin v. Conner, the inmate in the present matter, was aware that a transfer to a higher security level was within the ordinary confines of his sentence, and further, the transfer in no way affected the duration of his sentence. Moreover, the inmate in the present case simply had a unilateral hope in not being transferred to a higher level of security since transfers are wholly within the discretion of the DOC. Therefore, the nature of this interest cannot be considered substantial, and is not protected under the Due Process Clause.

Further, the State of Oklahoma has no law stating that only if certain conditions are met, can an inmate in the Program be transferred to a higher level of security, unlike Wolff v. McDonnell where the state law mandated that good time credits could not be taken away unless a proper hearing was held and serious or flagrant misconduct found. In Meachum v. Fano, there was no state law which addressed when a prisoner could be transferred to a higher level of security. Likewise, in the present matter there is no state law or DOC regulation which addresses when a particular prisoner can be or must be transferred from the Program to a higher security level.

It is important to examine all of the applicable law in Oklahoma governing an inmate in the Program. A significant characteristic of an inmate in the Program is that he is treated as an inmate housed within an institution. A prisoner in the Program is in a lower security level, but still retains his inmate status. Having a participant of the Program retain their inmate status was

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[20]See Dominique v. Weld, 73 F.3d 1156, 1159-1160 (1st Cir. 1996) (Appellant did not have a state-created liberty interest in work release program).

the clear intention of the Oklahoma Legislature as evidenced by Okla. Stat. tit. 57, § 365 (Supp. 1990), which governs the Program. This statute says in pertinent part:

> E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.
>
> F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

These are the same procedures and consequences that an inmate in a higher level of security would be subject.

Since an inmate in the Program retains his inmate status in full and is regarded by the DOC as any other inmate, then the issue here becomes whether an inmate in the State of Oklahoma has a liberty interest in not being transferred without a hearing or a specific finding. This issue was clearly decided by Meachum v. Fano when this Court stated,

> Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct.
>
> . . . .
>
> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have

> discretion to transfer him for whatever reason or for no reason at all.

Meachum v. Fano, 427 U.S. at 226-228.

Just as with Massachusetts law, Oklahoma law confers no right on the prisoner to remain in the prison system to which he was assigned. Okla. Stat. tit. 57, § 365 (Supp. 1990) is silent as to when an inmate in the Program can be transferred to a higher level of security. Therefore, it is apparent that the DOC's decision to transfer a prisoner to a higher level of security is to remain within the DOC's discretion. This is consistent with Okla.Stat. tit. 57, § 510(9) (1991), which states that transferring prisoners is within the Director of Correction's discretion and powers. This statute has been upheld by both state and federal courts and has been interpreted at both levels as giving the DOC total discretion with respect to prison transfers. See Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978); Gettings v. Page, 442 P.2d 534 (Okla.Crim.App.1968). Thus, the transfer of an inmate in the Program to a higher security level is completely within the discretion of the DOC, and an inmate in the Program retains no liberty interest in remaining at the lower security level.

The transfer of Respondent from the Program to a higher security classification was purely a discretionary matter and did not impose an "atypical and significant hardship ... in relation to the ordinary incidents of prison life." Sandin v. Conner, 132 L.Ed.2d at 430. Thus, the State of Oklahoma did not create a liberty interest in continued placement in the Program that would entitle the Respondent to any procedural protections.

CONCLUSION

The Program establishes a level of security consistent with an inmate's sentence. Participation in the Program does not create a liberty interest sufficient to trigger the procedural protections of the Due Process Clause. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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